IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 78 - 1870

WHIRLPOOL CORPORATION, *Petitioner,*

v

RAY MARSHALL, SECRETARY OF LABOR, *Respondent.*

On Appeal From the United States Court of Appeals
For the Sixth Circuit

MOTION OF THE AMERICAN PUBLIC HEALTH ASSOCIATION FOR LEAVE TO FILE A BRIEF *Amicus Curiae* AND BRIEF *Amicus Curiae* IN SUPPORT OF RESPONDENT

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MOTION OF THE AMERICAN PUBLIC HEALTH ASSOCIATION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Pursuant to Supreme Court Rule 42(3), the American Public Health Association (APHA) respectfully moves for leave to file the accompanying brief in this case as *amicus curiae.* Respondent has consented to the filing of this brief; petitioner has not.

APHA, a non-profit corporation organized in 1872, maintains a large and diverse membership of 30,000 public health professionals, including top-level officials in state and local health departments, professors and administrators in schools of public health, and high-ranking officials in various federal agencies. The Association, which exists to promote and protect the public health, has devoted attention and resources

for many years to the occupational safety and health problems facing American workers. The decision in this case will have serious impact on the long term efforts of APHA members to reduce the incidence of death, injury, and disease caused by hazardous working conditions.

APHA is deeply concerned that workers receive the full protection accorded them under the Occupational Safety and Health Act of 1970 (OSH Act). Moreover, the APHA and its membership attach special importance to the outcome of this case as a test of the true strength of the Act's remedial and more specifically, preventive purposes. Because of the OSH Act's profound effect on the public health, *Amicus* urges the Court to reaffirm the broad remedial mandate of the law.

APHA submits the attached brief to insure the Court's full awareness of these issues, which it believes may not be adequately emphasized elsewhere.

APHA therefore moves for leave to file the accompanying brief as *amicus curiae.*

Respectfully submitted,

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BRIEF OF THE AMERICAN PUBLIC HEALTH ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS CURIAE

This brief is filed on behalf of the American Public Health Association (APHA).

APHA, a non-profit corporation organized in 1872, consists of over 30,000 members nationwide. The organization has a large and diverse membership, including directors and other top-level officials in state and local health departments, professors and administrators of schools of public health, and high-ranking officials in various federal agencies. Occupational safety and health has been a major area of interest and concern to the Association at least since 1914, when a membership section in this area was established.

The purpose of APHA and its members is to protect and promote public health. To that end, it is deeply concerned with

the safety and health of American workers. Occupational illness and injury had reached epidemic proportions at the time Congress enacted the OSH Act in 1970, and continues today at an excessive cost, in terms of both lost productivity and destruction to the quality of life for hundreds of thousands of workers.

With the elimination of infectious disease epidemics through public health sanitation and immunization methods, the workplace today remains the largest source of disease, death and disability preventable through change in living and working conditions.

The enormity of the problem posed by hazards in the workplace is graphically illustrated by the fact that every *month* approximately 2000 work-related amputations occur in this country.[1] Work-related accidents result in 13,000 deaths each year, and 2.3 million disabling injuries, of which 80,000 are permanently disabling.[2] Total work-related deaths each year number 100,000.[3] The annual cost of these occupationally-linked illnesses, injuries and deaths has been estimated at $20.3 billion.[4]

Public health problems of the magnitude and complexity of those in occupational safety and health require a broad

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[1]Memorandum from Dr. James Oppold, Director, Division of Safety Research, National Institute of Occupational Health (NIOSH), to Director, NIOSH, on OSHA compiled statistics (March 23, 1979).

[2]National Safety Council, *Accident Facts: 1979.*

[3]Testimony by Dr. Finklea, Director, NIOSH, before Subcommittee on Manpower and Housing, House Committee on Government Operations (May 11, 1976).

[4]The current cost of workers' compensation payments alone has been estimated at $7½ billion, a fourfold increase since 1960. *1978 Statistical Abstracts of the United States,* 355.

spectrum of responses from private and governmental sources. The Occupational Safety and Health Act of 1970, 29 U.S.C. §651 *et seq.* ("The Act" or the "OSH Act") represents perhaps the most comprehensive and significant attempt to address the problem. The Act establishes a framework within which employers employees and the government can work together to ensure a safe workplace for every American worker.

The OSH Act was intended by its framers to provide a safe and healthful environment to all workers through preventive measures. As the House Labor Committee stated: "Death and disability prevention is the primary intent of this bill." Leg. Hist. of the Occupational Safety and Health Act of 1970 at 853, quoted in *Brennan* v. *OSHRC (Underhill Const. Corp.),* 513 F.2d 1032, 1039 (2d Cir. 1975). Appellate courts have reiterated this preventive purpose. *Arkansas - Best Freight Systems, Inc.* v. *OSHRC* 529 F.2d 649, 653 (8th Cir. 1976) ("The Act is intended to prevent the first injury, including those of a more serious nature."); *Lee Way Motor Freight, Inc.* v. *Secretary of Labor,* 511 F.2d 864, 870 (10th Cir. 1975) ("One purpose of the Act is to prevent the first accident.")

APHA and its membership attach special importance to the outcome of this case because it tests the true strength of the remedial, and, more specifically, the preventive thrust of the Act. We urge this Court to reaffirm the remedial mandate of the law by recognizing the validity of the regulation at issue.

SUMMARY OF ARGUMENT

The issue before this Court turns on the validity of 29 CFR §1977.12(b) (2).[5] The central question is whether the Secretary

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[5]The regulation provides:

(2) However, occasions might arise when an employee is confronted with a choice between not performing assigned tasks or subjecting himself to serious injury or death arising from a hazardous condition at the workplace. If the employee, with no reasonable alternative,

of Labor has acted within his authority by limiting the power of an employer to discipline an employee who, based on a reasonable and good faith belief, temporarily leaves his job to avoid a life-threatening situation. In our view, the regulation at issue effectuates the remedial purposes of the Act and represents a proper and necessary exercise of administrative discretion. As such, it should be upheld. To hold otherwise would impose on employees the cruel dilemma of choosing between their jobs and their lives.

At the outset, we submit that to understand the validity of CFR §1977.12(b) (2) requires a recognition that 1) the facts presented herein show that the workplace at issue was in serious violation of the entire spirit of the Act and 2) the regulation in question prescribes an appropriate remedy for this kind of violation.[6] First, the place of employment presented a recognized hazard, one of which the employer was already

[5]Continued from previous page....

> refuses in good faith to expose himself to the dangerous condition, he would be protected against subsequent discrimination. The condition causing the employee's apprehension of death or injury must be of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels. In addition, in such circumstances, the employee, where possible, must also have sought from his employer, and been unable to obtain, a correction of the dangerous condition.

[6]Indeed, the underlying facts of this case may well establish a violation of the letter of the law, as well as its spirit. The Act imposes on every employer the general duty

> to furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.

29 U.S.C. §654(a) (1).

acutely aware. In fact, prior to the events in this case, OSHA had already cited the company for a violation of the general duty clause. Furthermore, the company itself had recognized the seriousness of the danger: it had issued a general order instructing workers to keep off the guard screens. Finally, the hazard threatened not only the safety of workers but their lives: one worker had died in an accident caused by this hazard only twelve days earlier in the same plant.

A violation of this magnitude demands a remedy, whether explicitly contained in the Act or implied from the overall remedial thrust of the legislation. Indeed, courts have often implied remedies to protect the intended beneficiaries of a remedial statute and to effectuate the general purposes of the law. Where a statutory violation arises, "it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purposes." *J.I. Case Company* v. *Borak,* 377 U.S. 426, 433 (1964). *Cannon* v. *University of Chicago,* 99 S.Ct. 1946, 1961 (1979). ("...when [a] remedy is necessary or at least helpful to the accomplishment of the statutory purpose, the Court is decidedly receptive to its implication under the statute.") See also *Gomez* v. *Florida State Employment Service,* 417 F.2d 569 (5th Cir. 1969).

In the instant case, however, this Court need not address directly the "implied remedy" question. Rather, we are simply asking the Court to grant the Secretary of Labor the administrative latitude to which he is entitled under both the Act and established precepts of judicial review.

ARGUMENT

THE COURT SHOULD UPHOLD THE SECRETARY'S REGULATION AS A REASONABLE AND NECESSARY INTERPRETATION TO CARRY OUT THE REMEDIAL PURPOSES OF THE ACT

I. THE SECRETARY HAS WIDE DISCRETION TO PROMULGATE REGULATIONS UNDER THE STATUTE

The Act has bestowed on the Secretary of Labor broad powers to promulgate implementing regulations.[7] The courts, moreover, have deferred generally to agency expertise in reviewing agency exercise of its rulemaking powers. When focusing on statutes designed to protect public health and safety, courts have placed even greater confidence in the ability of the congressionally designated agency to promulgate regulations designed to carry out effectively the remedial mandate of the law. As one Appeals Court has stated:

> [I]n all matters regulated by a Congressionally authorized agency, judicial line-drawing in countless possible industrial and commercial situations should begin with deference to the expertise of the agency or administrator involved, especially in questions pertaining to the labor laws.

Brennan v. *Wilson Building, Inc.*, 478 F.2d 1090, 1098 (5th Cir. 1973), *cert. denied*, 414 U.S. 855 (1973).

When asked to consider the validity of OSHA regulations, courts have found the Secretary of Labor's interpretation of the

[7]The statute provides:

> The Secretary and the Secretary of Health, Education, and Welfare shall each prescribe such rules and regulations as he may deem necessary to carry out their responsibilities under this Act, including rules and regulations dealing with the inspection of an employer's establishment. 29 U.S.C. §657 (g) (2).

Act to be "controlling even though there may be another interpretation which is equally reasonable." *Clarkson Const. Co.* v. *OSHRC*, 531 F.2d 451, 457 (10th Cir. 1976), *Accord, Builders Steel Co.* v. *Marshall*, 575 F.2d 663, 666 (8th Cir. 1978); *Intercounty Const. Co.* v. *OSHRC*, 522 F.2d 777, 779 (4th Cir. 1975), *cert. denied*, 423 U.S. 1072 (1976). In short, judicial precedent makes it quite clear that courts should accord great weight to agency regulations.

II. THE REGULATION AT ISSUE, APPLICABLE TO LIMITED BUT VITAL CIRCUMSTANCES, IS NECESSARY TO ROUND OUT THE BROAD REMEDIAL PURPOSES OF THE ACT

The Act prescribes a broad and varied set of remedies to deal with safety and health violations when they occur. For most situations, the enforcement scheme expressly provided in the OSH Act is adequate to guarantee the rights of both employees and employers. For one narrow category of hazard, however, the Act offers absolutely no explicit remedy.

Thus, if one pictures the actual steps required to obtain from the Review Commission some form of relief, it becomes readily apparent that the procedural safeguards afforded employers render it an extremely time-consuming process.[8] In the instant case, for example, four years after the citation was issued, it was still in litigation. *Marshall* v. *Whirlpool Corp.*, 593 F.2d 715, 719, n.6.

Congress also adopted an imminent danger provision to deal with more immediate safety and health problems. 29

[8]After a citation is issued, an employer has 15 days to file a notice of contest. Twenty days after a notice of contest is received the Secretary must issue a complaint. The employer then has 15 days in which to file his answer. The Commission faces no time limit in which to schedule a hearing or issue a decision. This decision becomes final 30 days after it is issued. See, generally, 29 U.S.C. §559(c) and 29 CFR §2200 for details on these procedures.

U.S.C. §662(a). However, just as the administrative procedures are too lengthy, the imminent danger proceeding is wholly inadequate to cover such emergency situations as the high winds in *Daniel*[9] or the foreman's 11:00 p.m. order to return to the unsafe area in *Whirlpool*. The imminent danger proceeding requires at a minimum 1) that an inspection be conducted; 2) that a complaint be filed in federal court; and 3) that a hearing be held on the temporary restraining order. These procedures typically take several days, even if no delay occurs.

When one considers the realities of seeking judicial relief from the kind of emergency and life-threatening danger presented in this case, one reaches an inescapable conclusion: the protections afforded under the imminent danger provision clearly are not drawn to meet this situation. They create a serious, though small, gap in the OSHA enforcement scheme expressly provided by the Act.

Admittedly, the *Whirlpool*-type situation, characterized by both extreme urgency and the risk of serious harm, will arise very infrequently. Indeed, it has been estimated that 99% of all employers will voluntarily correct hazards brought to their attention.[10] Furthermore, for the remaining 1% of employers, many workers may be able to obtain adequate relief through normal OSHA enforcement procedures.[11] In a small number of cases, however, workers have no other recourse but to remove themselves temporarily from an extremely dangerous work situation.

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[9]Marshall v. Daniel Const. Co., Inc. 563 F.2d 707 (5th Cir. 1977).

[10]Subcomm. on Labor, Sen. Comm. on Labor and Public Welfare, *Legislative History of the Occupational Safety and Health Act of 1970,* 452-453, 1009 (Comm. Print 1971).

[11]In 1977, OSHA received no more than 600 12 (b) (2) complaints. When one considers the size of the working population covered by OSHA, 62 million, this number borders on the infinitesimal. U.S. Dep't. of Labor, OSHA, FY 1977 Completed Cases Surveys, (March 24, 1978).

Even when a situation presents itself, very few workers will risk their jobs to avail themselves of §1977.12(b) (2) protection. Thus, the specter raised by the *Daniel* court that workers will abuse this right, causing disruption or termination of the employer's business, is unfounded for several reasons. 563 F.2d at 714. This regulation presents a very unattractive option because it provides workers with minimal protection in the face of employer retaliation. Thus, a worker who leaves his job because of an ultra-hazardous work situation faces termination. He must then file an 11(c) complaint and he later bears the burden of proving that the belief prompting him to leave his job was in fact reasonable. Finally, he may remain unemployed for a considerable time, pending a determination by both administrative and judicial agencies that his actions were legally justifiable.

The Secretary of Labor has properly exercised his discretion in promulgating this regulation. It is precisely because Congress could not possibly predict all conceivable enforcement problems that it entrusted the Secretary with rulemaking authority of this scope. We contend that the Secretary acted well within that authority in implementing 29 CFR §1977.12(b) (2). We further contend that the Secretary had little choice in carrying out his statutory responsibilities but to make explicit what the clear remedial purposes of the Act imply.

III. THE REGULATION, AT 29 C.F.R. §1977.12(b) (2), REPRESENTS A REASONABLE EXERCISE OF AGENCY DISCRETION

We have shown that it is in keeping with the spirit of the Act to grant an employee the limited right to leave his workplace when he reasonably perceives an immediate threat to his health or safety.[12] Industry appears to suggest, however,

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[12]Both the *Whirlpool* and *Daniel* courts have engaged in exhaustive discussion of the relevant legislative history, although they reached

that sustaining this regulation would create a veritable revolution in labor-management relations. This suggestion is a great exaggeration. In fact, the rights enunciated in the regulation at issue here already exist to some extent.

In resolving safety and health issues, arbitration decisions have generally recognized the right of an employee to refuse to obey a work order when he reasonably believes that such obedience would pose an immediate threat to his health or safety.

> The principle...is that an employee may refuse to carry out a particular work assignment if, at the time he is given the work assignment, he reasonably believes that by carrying out such work assignment he will endanger his safety or health. In such an instance the employee has the duty, not only of stating that he believes there is a risk to his safety or health, and the reason for believing so, but he also has the burden, if called upon, of showing by appropriate evidence that he had a reasonable basis for his belief. In the case of dispute, as is the case here, the question to be decided is not whether he actually would have suffered injury but whether he had a reasonable basis for believing so.

Laclede Gas Co., 39 LA 833, 839 (1962). See generally, *Elkouri & Elkouri, HOW ARBITRATION WORKS, ch. 16 (3d ed. 1973)*

Thus, arbitration decisions have generally incorporated these legal principles. Similarly, other federal labor laws extend

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[12]Continued from previous page....

differing conclusions. We contend, however, that the facts at issue here involve neither a "strike with pay" nor an "administrative shutdown;" and thus, the legislative history is not decisive on the issue before this Court.

a certain measure of protection to employees confronted with ultra-hazardous working conditions.[13]

We submit that the Secretary of Labor acted well within the bounds of his authority when he adopted the regulation at issue here. We further contend that any regulation that failed to provide a remedy for the kind of emergency situation presented in *Whirlpool* would be patently unreasonable, because it would contravene well established principles of labor law. This regulation correctly implements the remedial, and more particularly the preventive, spirit of the Act in a narrow, but vital, set of circumstances.

CONCLUSION

For all of the foregoing reasons, we urge this Court to sustain the regulation.

Respectfully submitted,

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[13]See, for example, *Gateway Coal Company* v. *United Mine Workers of America*, 414 U.S. 368 (1974); *N.L.R.B.* v. *Washington Aluminum Co.*, 370 U.S. 9 (1962).

We wish to acknowledge the assistance of Bernard Moss, a third year law student at U.C.L.A.